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U S WEST and CRSTTA appealed the Commission's decision. By Order dated February 21, 1997, the Honorable Steven L. Zinter, Circuit Court Judge, issued his Memorandum Decision. The Circuit Court ordered the Commission to enter Findings of Fact on each of the statutory factors listed in SDCL 49-31-59. The Circuit Court also reversed and remanded the Commission's decision because the Commission improperly conditioned its approval upon CRSTTA's refusal to waive its sovereign immunity. The Circuit Court also found that the Commission erred in concluding that SDCL 49-1-17 prohibited approval of the proposed sales. The Notice of Entry of Order of Remand was filed on March 6, 1997.

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At the July 15, 1997, meeting, the Commission also voted to deny the sale of the McIntosh exchange as contrary to the public interest.

Based on the evidence presented on the record and the decision of the Circuit Court the Commission makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. U S WEST is a Colorado corporation providing local exchange telecommunications services, interexchange carrier access, intraLATA interexchange telecommunications services, and other telecommunications services throughout South Dakota.

2. On or about December 7, 1994, U S WEST entered into purchase agreements for the sale of 67 local exchanges with 20 local exchange telecommunications companies. On December 20, 1994, U S WEST and the Buyers filed a Joint Application for a Commission Declaration on the Sale and for Proper Accounting Treatment of any Gain. Exhibit 29. U S WEST and the Buyers filed all 20 purchase agreements along with the Joint Application. Exhibits 31-50. One of the purchase agreements entered into was between U S WEST and CRSTTA. Exhibit 32.

3. CRSTTA is a telecommunications company and a division of the Cheyenne River Sioux Tribe. CRSTTA currently provides telecommunications services in South Dakota. Exhibit 22 at page 119.

4. Owl River is a wholly-owned subsidiary of CRSTTA incorporated under the laws of the Cheyenne River Sioux Tribe. Exhibit 22 at page 119. Owl River has no license to do business in the state of South Dakota. Exhibit 22 at pages 145-146.

5. The purchase agreement entered into between CRSTTA and U S WEST states as follows:

Seller and Buyer agree to promptly file any required application and to take such reasonable action as may be necessary or helpful (including, but not limited to, making available witnesses, information, documents, and data requested by the PUC) to apply for and receive approval by the PUC for the transfer of Assets and Authorities to Buyer.

Exhibit 32, Section 6.3, subparagraph D.

6. In the Joint Application filed with the Commission on December 20, 1994, U S WEST and CRSTTA had entered into a purchase agreement where U S WEST proposed to sell the Nisland, Timber Lake, and Morristown exchanges to CRSTTA.

7. A duly noticed public hearing was held at Mobridge, South Dakota, on April 17, 1995, at the City Auditorium, beginning at 8:00 p.m., concerning, along with other sales, the sale of the Timber Lake, Morristown, and McIntosh exchanges. At the time of the hearing, West River Cooperative Telephone, Inc. (West River) was the proposed buyer of the McIntosh exchange.

8. A duly noticed public hearing was held at Sturgis, South Dakota, on April 18, 1995, beginning at 7:00 p.m. M.D.T. concerning, along with other sales, the sale of the Nisland exchange. At the hearing, the Buyers announced that CRSTTA would no longer

be purchasing the Nisland exchange. Instead, West River proposed to purchase the Nisland and Newell exchanges and CRSTTA proposed to purchase the McIntosh exchange which West River had originally intended to purchase. Exhibit 23 at pages 5-6.

9. The amended Joint Application setting forth the changes in the buyers of the Nisland, Newell, and McIntosh exchanges was filed with the Commission on May 1, 1995. Exhibit 30. Due to the amendment of the Joint Application, the Commission set a new intervention deadline of May 12, 1995. The city of McIntosh and Corson County applied for and were granted intervention. The Commission held another public hearing on May 25, 1995, at the McIntosh School Gymnasium, in McIntosh. Testimony was given by members of the public in opposition to the sale of the McIntosh exchange to CRSTTA. Exhibit 28 at pages 118-160. The two main concerns of the public were lack of Commission oversight and loss of tax dollars.

10. On June 1-4, 1995, in Pierre, South Dakota, a final hearing was held concerning all of the proposed exchange sales. Members of the public testified in opposition to and in support of the sale of the McIntosh exchange to CRSTTA. Transcript of Pierre Hearing at pages 707-736, 770-779.

11. The McIntosh exchange is located within the boundaries of the Standing Rock Sioux Reservation. Exhibit 93.

12. CRSTTA maintains that if the sale of the McIntosh exchange to CRSTTA were allowed, the Commission would lose all regulatory control over the McIntosh exchange. Exhibit 28 at page 36.

13. CRSTTA does not pay gross receipts taxes on the telephone exchanges it currently operates. Exhibit 22 at page 123. J. D. Williams, manager of CRSTTA, stated that the state "may impose its gross receipts tax on the income generated from sales to non-Indians and non-members of the area. However, it has no mechanism whereby to force the tribe to collect the tax. The tribe has a sales tax agreement with the state and a similar arrangement may be possible with respect to collecting a gross receipts tax." Exhibit 22 at page 132.

14. CRSTTA proposed a Memorandum of Understanding which provided that CRSTTA would follow the same regulatory procedures found under South Dakota law. Exhibit 145. However, pursuant to that Memorandum of Understanding, the Commission was given no regulatory oversight.

15. The Commission lacks the authority to enter into a tax agreement with a tribal entity. No tax agreement was reached with the state of South Dakota by the close of the record on June 19, 1995.

16. Local exchange service provided by a telecommunications company is classified as a noncompetitive service. SDCL 49-31-1.1.

17. The South Dakota State Legislature has charged the Commission with important duties in overseeing telecommunications services within the state of South Dakota and has further vested in the Commission significant powers to protect telecommunications subscribers. SDCL Chapters 49-1, 49-13, and 49-31.

18. If the sale of the McIntosh exchange to CRSTTA were approved, CRSTTA would not recognize the Commission as having regulatory authority over CRSTTA and the McIntosh exchange. Exhibit 28 at page 36.

19. None of the subscribers of the McIntosh exchange would be able to vote for Tribal Council members or elect Board of Directors to Owl River. Exhibit 28, at pages 55-56.

20. CRSTTA currently provides adequate service to its present customers. Exhibit 28 at pages 37-38. However, unlike other sales approved by the Commission, the Commission is unable to require, as a condition of the sale, that CRSTTA offer, at a minimum, all existing services currently offered by U S WEST in the McIntosh exchange. In addition, the Commission is unable to require, as a condition of the sale, that CRSTTA honor all existing U S WEST contracts, commitments, leases, licenses, and other agreements which relate to, arise from, or are used for the operation of the purchased exchange. This lack of regulatory control by the Commission combined with the lack of the ability of a subscriber to vote or have a political voice in CRSTTA could negatively affect adequacy of service.

21. With respect to the factor of reasonableness of rates for local service, CRSTTA states that it would charge the same rates that U S WEST currently charges. Exhibit 28 at page 41. However, unlike other sales approved by the Commission, the Commission is unable to require as a condition of the sale that CRSTTA not increase current local rates for 18 months.

22. On the factor of the provisioning of 911, enhanced 911, and other public safety services, CRSTTA offers free firebar service to volunteer fire departments in communities it currently services. Exhibit 22 at page 124. It currently does not offer 911 or E-911 service because the counties have not yet authorized the collection of taxes for 911. Id. at page 125.

23. Since CRSTTA maintains that there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would also result in the loss of significant tax revenue for cities, counties, and school districts located within the McIntosh exchange. Exhibits 94, 95, 96, 97A, 97B; Exhibit 28 at pages 126-129, 133-137; Transcript of Pierre Hearing at pages 707-731. The position of CRSTTA creates conflict and, at a minimum, uncertainty as to the taxability of CRSTTA.

24. With respect to the factor concerning the ability of the local exchange company to provide modern, state-of-the-art telecommunications services that will help promote economic development, telemedicine, and distance learning in rural South Dakota, CRSTTA has the ability to provide these services. Exhibit 28 at pages 97-98. In addition, CRSTTA has no plans to change existing extended area service. Exhibit 28 at pages 35-36. However, unlike other sales, the Commission is unable to require as a condition of sale that CRSTTA not change any current extended area service arrangements without prior approval by the Commission. In addition, unlike the other sales of exchanges that were approved, the Commission would be unable to require CRSTTA to make any improvements necessary for the public safety, convenience, and accommodation as allowed by SDCL 49-31-7.

25. On the issue of whether the sale is in the public interest, the Commission finds the sale is not in the public interest for the following reasons:

1. Since CRSTTA maintains there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would result in the loss of significant tax revenue for cities, counties, and school districts located within the McIntosh exchange;
2. The lack of regulatory control by the Commission would mean that the Commission would be unable to set conditions of sale that must be followed by CRSTTA.
3. The Commission is unable to require as a condition of the sale that CRSTTA offer all existing services currently offered by U S WEST;
4. The Commission is unable to require as a condition of the sale that CRSTTA honor all existing U S WEST contracts and agreements;
5. The lack of regulatory control and the lack of the ability of subscribers to vote or have a political voice in CRSTTA could negatively affect adequacy of service;
6. The Commission is unable to require as a condition of sale that CRSTTA not increase the current local rates for 18 months;
7. The Commission is unable to require as a condition of the sale that CRSTTA not change any current extended area service arrangements without prior approval by the Commission; and
8. The Commission is unable to require CRSTTA to make any improvements necessary for the public's safety, convenience, and accommodation as allowed by SDCL 49-31-7.

26. The Commission rejects the proposed Findings of Fact and Conclusions of Law submitted by the parties.

From the foregoing Findings of Fact, the Commission now makes its:

### CONCLUSIONS OF LAW

1. The Commission has jurisdiction over U S WEST and CRSTTA and the sale of the McIntosh exchange to CRSTTA pursuant to SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, 49-31-20, and 49-31-59. At the final hearing CRSTTA contested the jurisdiction of the Commission pursuant to SDCL 49-31-59 by claiming that it was an ex post facto law. This argument is without merit since ex post facto applies only to criminal laws and laws that assess penalties. Delano v. Pettys, 520 N.W.2d 606, 608 (S.D. 1994). Moreover, the Joint Application was amended on May 1, 1995, which was after the passage of SDCL 49-31-59. In addition, the purchase agreement entered into between U S WEST and CRSTTA specifically

provides that U S WEST and CRSTTA would cooperate in obtaining Commission approval for the transfer of assets and authority to CRSTTA. Finally, CRSTTA did not contest, at any of the hearings, the jurisdiction of the Commission pursuant to the other statutes under which the Commission asserts its jurisdiction.

2. The hearings held by the Commission relative to this matter were contested case hearings pursuant to SDCL Chapter 1-26.

3. The Commission lacks the authority to enter into a tax agreement with a tribal entity.

4. The Commission finds that CRSTTA currently provides adequate service to its present customers. However, unlike other sales approved by the Commission, the Commission is unable to require, as a condition of the sale, that CRSTTA offer, at a minimum, all existing services currently offered by U S WEST in the McIntosh exchange. In addition, the Commission is unable to require, as a condition of the sale, that CRSTTA honor all existing U S WEST contracts, commitments, leases, licenses, and other agreements which relate to, arise from, or are used for the operation of the purchased exchange. Further, the lack of regulatory control by the Commission and the lack of the ability of subscribers to vote or have a political voice in CRSTTA could negatively affect adequacy of service.

5. The Commission finds CRSTTA plans to charge the same rates that U S WEST currently charges. However, unlike other sales approved by the Commission, the Commission is unable to require as a condition of the sale that CRSTTA not increase current local rates for 18 months.

6. The Commission finds CRSTTA offers free firebar service to volunteer fire departments in communities it currently services. Exhibit 22 at page 124. It currently does not offer 911 or E-911 service because the counties have not yet authorized the collection of taxes for 911. Id. at page 125.

7. The Commission finds that approval of the sale of the McIntosh exchange would have significant, adverse tax consequences to the taxpayers located in the cities, counties, and school districts within the McIntosh exchange due to CRSTTA's position that the state lacks the authority to enforce the collection of taxes on the Reservation.

8. The Commission finds that CRSTTA has the ability to provide modern, state-of-the-art telecommunications services. In addition, CRSTTA has no plans to change existing extended area service. However, unlike other sales, the Commission is unable to require as a condition of sale that CRSTTA not change any current extended area service arrangements without prior approval by the Commission. In addition, unlike the other sales of exchanges that were approved, the Commission would be unable to require CRSTTA to make any improvements necessary for the public safety, convenience, and accommodation as allowed by SDCL 49-31-7.

9. The Commission finds the sale is not in the public interest for the reasons listed in Finding of Fact 25.

10. The Commission rejects the proposed Findings of Fact and Conclusions of Law submitted by the parties.

Pursuant to SDCL Chapter 1-26, the Commission hereby enters its final decision in this docket. It is therefore

ORDERED that the sale of the McIntosh exchange to the Cheyenne River Sioux Tribe Telephone Authority, through its subsidiary Owl River Telephone, Inc. is not approved; and it is

FURTHER ORDERED that the proposed Findings of Fact and Conclusions of Law submitted by the parties are rejected.

#### NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 22nd day of August, 1997. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 22nd day of August, 1997.

CERTIFICATE OF SERVICE	
The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.	
By:	<u>Melanie Kalls</u>
Date:	<u>8/22/97</u>
(OFFICIAL SEAL)	

BY ORDER OF THE COMMISSION:

James A. Burg  
JAMES A. BURG, Chairman

PAM NELSON, Commissioner, abstained

Laska Schoenfelder  
LASKA SCHOENFELDER, Commissioner



**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF SOUTH DAKOTA**

<b>IN THE MATTER OF THE SALE OF CERTAIN</b>	<b>)</b>	<b>AMENDED DECISION AND</b>
<b>TELEPHONE EXCHANGES BY U S WEST</b>	<b>)</b>	<b>ORDER REGARDING SALE</b>
<b>COMMUNICATIONS, INC. TO CERTAIN</b>	<b>)</b>	<b>OF THE TIMBER LAKE</b>
<b>TELECOMMUNICATIONS COMPANIES IN</b>	<b>)</b>	<b>EXCHANGE; NOTICE OF</b>
<b>SOUTH DAKOTA</b>	<b>)</b>	<b>ENTRY OF ORDER</b>
	<b>)</b>	<b>TC94-122</b>

**PRELIMINARY STATEMENT**

On December 20, 1994, a Joint Application was filed by U S WEST Communications, Inc. (U S WEST), and twenty telecommunications companies (Buyers) requesting that the South Dakota Public Utilities Commission (Commission) approve the sale by U S WEST of 67 local telecommunications exchanges to the Buyers or their affiliates. Specifically, the filing sought:

1. A declaration that the sale and transfer of the exchanges do not require Commission approval or in the alternative that the Commission knows of no reason why the sale and transfer should not occur; and
2. An order from the Commission that U S WEST's gain from the sale be booked to Account 7350 of the Uniform System of Accounts (USOA) as nonoperating income not available for ratemaking purposes.

The Commission assumed jurisdiction over this docket pursuant to its authority under SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, and 49-31-20. The Commission set an intervention deadline of January 25, 1995. Subsequently, the following parties applied for and were granted intervention: AT&T Communications of the Midwest, Inc. (AT&T); South Dakota Radio Common Carriers [composed of Pierre Radio Paging and Telephone, Inc.; Vantek Communications, Inc.; B&L Communications; Mitchell Two Way Radio; Nelson Electronics, Inc.; Booker Communications; Dakota Electronics; Rees Communications; A & M Radio, Inc.; Frey's Electronics; and Milbank Communications]; Roger D. McKellips; City of Mobridge; Walworth County; Doug Scott; Alcester Telephone System User's Group [composed of Phyllis Bergdale; Bernard Bergdale; Jay Clark; Cleo Clark; Wendell Solbert; Kathy Solbert; Dennis Jones; Robin Jones; Ronald Treiber; Becky Treiber; Gary McKellips; Deb McKellips; David Broadwell; Kathy Broadwell; Donowan Larson; Marlys Larson; Glenice Pilla; and Larry Pilla]; Midco Communications; LDDS; TeleTech; TCIC; FirsTel; TelServ; MCI; Corson County Commission; Thomas Brunner; Gary Brunner; Deanna J. Mickelson; Marjorie Reder; Duane Odle; Baltic Telecom Cooperative; Barbara Mortenson as an individual and a group of telephone users known as the Henry Users Citizens Group. LDDS later filed a petition to withdraw as an intervenor which was granted by the Commission. On March 30, 1995, Senate Bill 240, later codified as SDCL 49-31-59, became effective. The Commission added this statute to the other statutes under which it had asserted its jurisdiction.

On March 29, 1995, the Commission issued an Order for and Notice of Hearing for six regional evidentiary hearings to be held at various locations throughout the state of South Dakota. Notice of said hearings was given to the public by newspaper publications and radio announcements; personal notice was given to all parties to the docket. Pursuant to said Order of the Commission, and subsequent amended Orders, the following regional evidentiary hearings were held:

1. April 17, 1995, at the City Auditorium, 212 Main Street, Mobridge, South Dakota, for public testimony on the sale of the Selby, Gettysburg, Roscoe, Onida, Bowdle, Morristown, Timber Lake, Lemmon, Eureka, Ipswich, McIntosh, and Mobridge exchanges.
2. April 18, 1995, at the Community Center, 1401 LaZelle, Sturgis, South Dakota, for public testimony on the sale of the Nisland, Newell, and Hermosa exchanges.
3. May 1, 1995, at the St. Mary's Hall, 305 West Third, Winner, South Dakota, for public testimony on the sale of the Winner, Burke, Bonesteel, Reliance, Murdo, Lake Andes, Wagner, Gregory, Witten, Clearfield, Presho, and Platte exchanges.
4. May 3, 1995, at the Lake Area Technical Institute, Student Lounge, 230 11th Street NE, Watertown, South Dakota, for public testimony on the sale of the Webster, Clark, Florence, Hayti, Bradley, Willow Lake, Waubay, Castlewood, Summit, Peever, Veblen, Wilmot, Howard, Oldham, Revillo, and South Shore exchanges.
5. May 4, 1995, at the Johnson's Fine Arts Center, Room 134, Northern State University Campus, Aberdeen, South Dakota, for public testimony on the sale of the Britton, Pierpont, Roslyn, Wessington Springs, Mellette, Bristol, Frederick, Hecla, Doland, Wolsey, and Cresbard exchanges.
6. May 5, 1995, at the Alcester High School Gymnasium, Fifth and Iowa, Alcester, South Dakota, for public testimony on the sale of the Marion, Tyndall, Centerville, Viborg, Lesterville, Tabor, Hudson, Tripp, Parkston, Salem, Alcester, Bridgewater, and Canistota exchanges.

On May 1, 1995, U S WEST and the Buyers filed an amended Joint Application. In its amended Joint Application, U S WEST and the Buyers stated that since the filing of the Joint Application in December, "the sale of several exchanges to certain buyers has been reevaluated by the Buyers." They requested the following changes:

1. In the Agreement with Golden West Telephone Properties, Inc., delete in Exhibit A the Newell exchange, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly;
2. In the Agreement with West River Cooperative Telephone Company, Inc. (Bison), delete in Exhibit A the McIntosh exchange

and add the Newell and Nisland exchanges, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly; and

3. In the Agreement with Cheyenne River Sioux Tribe Telephone Authority, delete in Exhibit A the Nisland exchange and add the McIntosh exchange, and change the purchase price reflected in Paragraph 1.3 of the Agreement accordingly.

Due to the amended application, the Commission set a new intervention deadline of May 12, 1995. Subsequently, the city of McIntosh and Corson County applied for and were granted intervention. Because the application had been amended, the Commission held another public hearing on May 25, 1995, at the McIntosh School Gymnasium, McIntosh, South Dakota, for public testimony.

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U S WEST and CRSTTA appealed the Commission's decision. By Order dated February 21, 1997, the Honorable Steven L. Zinter, Circuit Court Judge, issued his Memorandum Decision. The Circuit Court ordered the Commission to enter Findings of Fact on each of the statutory factors listed in SDCL 49-31-59. The Circuit Court also reversed and remanded the Commission's decision because the Commission improperly conditioned its approval upon CRSTTA's refusal to waive its sovereign immunity. The Circuit Court also found that the Commission erred in concluding that SDCL 49-1-17 prohibited approval of the proposed sales. The Notice of Entry of Order of Remand was filed on March 6, 1997.

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At the July 15, 1997, meeting, the Commission also voted to deny the sale of the Timber Lake exchange because the sale was contrary to the public interest.

Based on the evidence presented on the record and the decision of the Circuit Court the Commission makes the following Findings of Fact and Conclusions of Law:

## FINDINGS OF FACT

1. U S WEST is a Colorado corporation providing local exchange telecommunications services, interexchange carrier access, intraLATA interexchange telecommunications services, and other telecommunications services throughout South Dakota.

2. On or about December 7, 1994, U S WEST entered into purchase agreements for the sale of 67 local exchanges with 20 local exchange telecommunications companies. On December 20, 1994, U S WEST and the Buyers filed a Joint Application for a Commission Declaration on the Sale and for Proper Accounting Treatment of any Gain. Exhibit 29. U S WEST and the Buyers filed all 20 purchase agreements along with the Joint Application. Exhibits 31-50. One of the purchase agreements entered into was between U S WEST and CRSTTA. Exhibit 32.

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Seller and Buyer agree to promptly file any required application and to take such reasonable action as may be necessary or helpful (including, but not limited to, making available witnesses, information, documents, and data requested by the PUC) to apply for and receive approval by the PUC for the transfer of Assets and Authorities to Buyer.

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6. In the Joint Application filed with the Commission on December 20, 1994, U S WEST and CRSTTA had entered into a purchase agreement where U S WEST proposed to sell the Nisland, Timber Lake, and Morristown exchanges to CRSTTA.

7. A duly noticed public hearing was held at Mobridge, South Dakota, on April 17, 1995, at the City Auditorium, beginning at 8:00 p.m., concerning, along with other sales, the sale of the Timber Lake, Morristown, and McIntosh exchanges. At the time of the hearing, West River Cooperative Telephone, Inc. (West River) was the proposed buyer of the McIntosh exchange.

8. A duly noticed public hearing was held at Sturgis, South Dakota, on April 18, 1995, beginning at 7:00 p.m. M.D.T. concerning, along with other sales, the sale of the Nisland exchange. At the hearing, the Buyers announced that CRSTTA would no longer

be purchasing the Nisland exchange. Instead, West River proposed to purchase the Nisland and Newell exchanges and CRSTTA proposed to purchase the McIntosh exchange which West River had originally intended to purchase. Exhibit 23 at pages 5-6.

9. The amended Joint Application setting forth the changes in the buyers of the Nisland, Newell, and McIntosh exchanges was filed with the Commission on May 1, 1995. Exhibit 30. Due to the amendment of the Joint Application, the Commission set a new intervention deadline of May 12, 1995. The city of McIntosh and Corson County applied for and were granted intervention. The Commission held another public hearing on May 25, 1995, at the McIntosh School Gymnasium, in McIntosh.

10. On June 1-4, 1995, in Pierre, South Dakota, a final hearing was held concerning all of the proposed exchange sales. Members of the public testified in opposition to and in support of the sale of the Timber Lake exchange to CRSTTA. Transcript of Pierre Hearing at pages 707-727, 738-779. The two main concerns of the public who testified in opposition to the sale were the lack of Commission oversight and the loss of tax dollars.

11. The Timber Lake exchange is located within the boundaries of the Cheyenne River Sioux Reservation and the Standing Rock Sioux Reservation. Exhibit 93.

12. CRSTTA maintains that if the sale of the Timber Lake exchange to CRSTTA were allowed, the Commission would lose all regulatory control over the Timber Lake exchange. Exhibit 22 at pages 131-132.

13. CRSTTA does not pay gross receipts taxes on the telephone exchanges it currently operates. Exhibit 22 at page 123. J. D. Williams, manager of CRSTTA, stated that the state "may impose its gross receipts tax on the income generated from sales to non-Indians and non-members of the area. However, it has no mechanism whereby to force the tribe to collect the tax. The tribe has a sales tax agreement with the state and a similar arrangement may be possible with respect to collecting a gross receipts tax." Exhibit 22 at page 132.

14. CRSTTA proposed a Memorandum of Understanding which provided that CRSTTA would follow the same regulatory procedures found under South Dakota law. Exhibit 145. However, pursuant to that Memorandum of Understanding, the Commission was given no regulatory oversight.

15. The Commission lacks the authority to enter into a tax agreement with a tribal entity. No tax agreement was reached with the state of South Dakota by the close of the record on June 19, 1995.

16. Local exchange service provided by a telecommunications company is classified as a noncompetitive service. SDCL 49-31-1.1.

17. The South Dakota State Legislature has charged the Commission with important duties in overseeing telecommunications services within the state of South Dakota and has further vested in the Commission significant powers to protect telecommunications subscribers. SDCL Chapters 49-1, 49-13, and 49-31.

18. If the sale of the Timber Lake exchange to CRSTTA were approved, CRSTTA would not recognize the Commission as having regulatory authority over CRSTTA and the Timber Lake exchange. Exhibit 22 at pages 131-132.

19. The majority of the subscribers of the Timber Lake exchange would be unable to vote for Tribal Council members or elect Board of Directors to Owl River. Exhibit 22 at pages 146-148

20. CRSTTA currently provides adequate service to its present customers. Exhibit 22 at pages 123-124. However, unlike other sales approved by the Commission, the Commission is unable to require, as a condition of the sale, that CRSTTA offer, at a minimum, all existing services currently offered by U S WEST in the Timber Lake exchange. In addition, the Commission is unable to require, as a condition of the sale, that CRSTTA honor all existing U S WEST contracts, commitments, leases, licenses, and other agreements which relate to, arise from, or are used for the operation of the purchased exchange. This lack of regulatory control by the Commission combined with the lack of the ability of the majority of subscribers to vote or have a political voice in CRSTTA could negatively affect adequacy of service.

21. With respect to the factor of reasonableness of rates for local service, CRSTTA states that it would charge the same rates that U S WEST currently charges. Exhibit 22 at page 174. However, unlike other sales approved by the Commission, the Commission is unable to require as a condition of the sale that CRSTTA not increase current local rates for 18 months.

22. On the factor of the provisioning of 911, enhanced 911, and other public safety services, CRSTTA offers free firebar service to volunteer fire departments in communities it currently services. Exhibit 22 at page 124. It currently does not offer 911 or E-911 service because the counties have not yet authorized the collection of taxes for 911. Id. at page 125.

23. Since CRSTTA maintains that there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would also result in the loss of significant tax revenue for cities, counties, and school districts located within the Timber Lake exchange. Exhibits 96, 142; Exhibit 28 at pages 126-129; Transcript of Pierre Hearing at pages 707-727. The position of CRSTTA creates conflict and, at a minimum, uncertainty as to the taxability of CRSTTA.

24. With respect to the factor concerning the ability of the local exchange company to provide modern, state-of-the-art telecommunications services that will help promote economic development, telemedicine, and distance learning in rural South Dakota, CRSTTA has the ability to provide these services. Exhibit 22 at pages 125-126, 136-137. In addition, CRSTTA has no plans to change existing extended area service. Exhibit 22 at pages 131. However, unlike other sales, the Commission is unable to require as a condition of sale that CRSTTA not change any current extended area service arrangements without prior approval by the Commission. In addition, unlike the other sales of exchanges that were approved, the Commission would be unable to require CRSTTA to make any improvements necessary for the public safety, convenience, and accommodation as allowed by SDCL 49-31-7.

25. On the issue of whether the sale is in the public interest, the Commission finds the sale is not in the public interest for the following reasons:

1. Since CRSTTA maintains there is no enforcement mechanism that would require CRSTTA to pay gross receipts taxes, approval of the sale would result in the loss of significant tax revenue for cities, counties, and school districts located within the Timber Lake exchange;
2. The lack of regulatory control by the Commission would mean that the Commission would be unable to set conditions of sale that must be followed by CRSTTA.
3. The Commission is unable to require as a condition of the sale that CRSTTA offer all existing services currently offered by U S WEST;
4. The Commission is unable to require as a condition of the sale that CRSTTA honor all existing U S WEST contracts and agreements;
5. The lack of regulatory control and the lack of the ability of the majority of subscribers to vote or have a political voice in CRSTTA could negatively affect adequacy of service;
6. The Commission is unable to require as a condition of sale that CRSTTA not increase the current local rates for 18 months;
7. The Commission is unable to require as a condition of the sale that CRSTTA not change any current extended area service arrangements without prior approval by the Commission; and
8. The Commission is unable to require CRSTTA to make any improvements necessary for the public's safety, convenience, and accommodation as allowed by SDCL 49-31-7.

26. The Commission rejects the proposed Findings of Fact and Conclusions of Law submitted by the parties.

From the foregoing Findings of Fact, the Commission now makes its:

### **CONCLUSIONS OF LAW**

1. The Commission has jurisdiction over U S WEST and CRSTTA and the sale of the Timber Lake exchange to CRSTTA pursuant to SDCL Chapter 49-31, specifically 49-31-3, 49-31-3.1, 49-31-4, 49-31-7, 49-31-7.1, 49-31-11, 49-31-18, 49-31-19, 49-31-20, and 49-31-59. At the final hearing CRSTTA contested the jurisdiction of the Commission pursuant to SDCL 49-31-59 by claiming that it was an ex post facto law. This argument is without merit since ex post facto applies only to criminal laws and laws that assess penalties. Delano v. Pettys, 520 N.W.2d 606, 608 (S.D. 1994). Moreover, the Joint Application was amended on May 1, 1995, which was after the passage of SDCL 49-31-59.



In addition, the purchase agreement entered into between U S WEST and CRSTTA specifically provides that U S WEST and CRSTTA would cooperate in obtaining Commission approval for the transfer of assets and authority to CRSTTA. Finally, CRSTTA did not contest, at any of the hearings, the jurisdiction of the Commission pursuant to the other statutes under which the Commission asserts its jurisdiction.

2. The hearings held by the Commission relative to this matter were contested case hearings pursuant to SDCL Chapter 1-26.

3. The Commission lacks the authority to enter into a tax agreement with a tribal entity.

4. The Commission finds that CRSTTA currently provides adequate service to its present customers. However, unlike other sales approved by the Commission, the Commission is unable to require, as a condition of the sale, that CRSTTA offer, at a minimum, all existing services currently offered by U S WEST in the Timber Lake exchange. In addition, the Commission is unable to require, as a condition of the sale, that CRSTTA honor all existing U S WEST contracts, commitments, leases, licenses, and other agreements which relate to, arise from, or are used for the operation of the purchased exchange. Further, the lack of regulatory control by the Commission and the lack of the ability of the majority of subscribers to vote or have a political voice in CRSTTA could negatively affect adequacy of service.

5. The Commission finds CRSTTA plans to charge the same rates that U S WEST currently charges. However, unlike other sales approved by the Commission, the Commission is unable to require as a condition of the sale that CRSTTA not increase current local rates for 18 months.

6. The Commission finds CRSTTA offers free firebar service to volunteer fire departments in communities it currently services. Exhibit 22 at page 124. It currently does not offer 911 or E-911 service because the counties have not yet authorized the collection of taxes for 911. Id. at page 125.

7. The Commission finds that approval of the sale of the Timber Lake exchange would have significant, adverse tax consequences to the taxpayers located in the cities, counties, and school districts within the Timber Lake exchange due to CRSTTA's position that the state lacks the authority to enforce the collection of taxes on the Reservation.

8. The Commission finds that CRSTTA has the ability to provide modern, state-of-the-art telecommunications services. In addition, CRSTTA has no plans to change existing extended area service. However, unlike other sales, the Commission is unable to require as a condition of sale that CRSTTA not change any current extended area service arrangements without prior approval by the Commission. In addition, unlike the other sales of exchanges that were approved, the Commission would be unable to require CRSTTA to make any improvements necessary for the public safety, convenience, and accommodation as allowed by SDCL 49-31-7.

9. The Commission finds the sale is not in the public interest for the reasons listed in Finding of Fact 25.

10. The Commission rejects the proposed Findings of Fact and Conclusions of Law submitted by the parties.

Pursuant to SDCL Chapter 1-26, the Commission hereby enters its final decision in this docket. It is therefore

ORDERED that the sale of the Timber Lake exchange to the Cheyenne River Sioux Tribe Telephone Authority, through its subsidiary Owl River Telephone, Inc. is not approved; and it is

FURTHER ORDERED that the proposed Findings of Fact and Conclusions of Law submitted by the parties are rejected.

#### NOTICE OF ENTRY OF ORDER

PLEASE TAKE NOTICE that this Order was duly entered on the 22nd day of August, 1997. Pursuant to SDCL 1-26-32, this Order will take effect 10 days after the date of receipt or failure to accept delivery of the decision by the parties.

Dated at Pierre, South Dakota, this 22nd day of August, 1997.

<p align="center"><b>CERTIFICATE OF SERVICE</b></p> <p>The undersigned hereby certifies that this document has been served today upon all parties of record in this docket, as listed on the docket service list, by facsimile or by first class mail, in properly addressed envelopes, with charges prepaid thereon.</p> <p>By: <u>Helaine Kalbs</u></p> <p>Date: <u>8/22/97</u></p> <p align="center">(OFFICIAL SEAL)</p>
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BY ORDER OF THE COMMISSION:

James A. Burg  
JAMES A. BURG, Chairman

PAM NELSON, Commissioner, abstained

Laska Schoenfelder  
LASKA SCHOENFELDER, Commissioner

**CONSTITUTION AND BY-LAWS OF THE CHEYENNE  
RIVER SIOUX TRIBE OF SOUTH DAKOTA**

**Preamble**

We, the Sioux Indians of the Cheyenne River Reservation in the State of South Dakota in order to establish our tribal organization, to conserve our tribal property, to develop our common resources, to establish justice, and to promote the welfare of ourselves and our descendants, do hereby ordain and establish this constitution and by-laws for our tribal council as a guide to its deliberations.

**Article I—Territory**

The jurisdiction of the Cheyenne River Reservation Sioux Tribe of Indians shall extend to the territory within the original confines of the diminished reservation boundaries, which are described by the act of March 2, 1889 (25 Stat. L. 883) and including trust allotments without the herein mentioned boundaries and such other lands as may be hereafter added thereto under any law of the United States, except as otherwise provided for by law.

**Article II—Membership**

**SECTION 1.** The membership of the Cheyenne River Sioux Tribe shall consist of the following:

- (a) ALL persons of Indian blood whose names appear on the official census roll of the tribe as of June 18, 1934.
- (b) ALL children born to any member of the Cheyenne River Sioux Tribe who is a resident of the reservation at the time of the birth of said children.

**SECTION 2.** The tribal council shall have the power:

- (a) To admit persons of Cheyenne River Sioux Indian blood to membership upon a two thirds (2/3) vote of the tribal council.
- (b) To strike from the census rolls of the Cheyenne River Sioux Tribe any person who makes application to sever his tribal relations and thereafter such person shall cease to be a member of the Cheyenne River Sioux Tribe of Indians.

**Article III—Governing Body**

**SECTION 1.** The governing body of the Cheyenne River Sioux Tribe shall consist of a council, known as the Cheyenne River Sioux Tribal Council.

**SECTION 2.** The governing body under this constitution and by-laws shall be composed of one (1) tribal chairman, one (1) tribal secretary, and one (1) tribal treasurer; also fifteen (15) councilmen and such offices as from time to time may be created by the tribal council.

**SECTION 3.** The tribal chairman, the tribal secretary and the tribal treasurer shall be elected at large by popular vote; councilmen shall be elected from each district or political subdivision of the reservation by the legal voters residing within the district or precinct from which such councilman is to be elected. There shall be thirteen (13) districts or voting precincts as hereinafter described in article III section 4 of the by-laws. Councilmen shall be apportioned by and from each district or voting precinct of the reservation as follows:

- 1. Agency precinct, which shall include the old Agency and Sheppard Bottom, Claymore Bottom, and Yearling Bottom. One (1) delegate.

SECTION 5. The first election of the tribal council members shall be held on call of the provisional committee which shall consist of twenty-six (26) members of the Cheyenne River Sioux Tribe of Indians, two (2) from each of the voting precincts on said reservation on October 27, 1934, and five Indian Service employees which committee the superintendent of said reservation may appoint to supervise the election of officers and councilmen, within thirty (30) days after this constitution and by-laws has been approved by the Secretary of the Interior.

SECTION 6. This committee shall issue its certificate of election to the persons receiving the highest number of votes in each district in accordance with the quota assigned hereby to each of said districts provided for in article III, section 3.

The officers and councilmen so elected and certified to shall report at the Cheyenne River Agency within ten days after the election and take the oath of office. The reservation superintendent shall administer the oath of office.

Said officers and councilmen shall convene within thirty (30) days after the election and organize for business and elect one assistant chairman from their own membership.

SECTION 7. The tribal council shall have supervision and authority over all subsequent elections as provided through by-laws or resolutions hereafter enacted.

#### Article IV—Powers of Self-Government

SECTION 1. The tribal council of the Cheyenne River Reservation shall exercise the following powers vested in the present council under existing laws or conferred by the act of June 18, 1934 (48 Stat. 964) and acts amendatory thereof or supplemental thereto, subject to any limitations imposed by the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws.

(a) To enter into negotiations with the Federal, State, and local Governments on behalf of the tribe.

(b) To present and prosecute any claims or demands of the Cheyenne River Sioux Tribe of Indians. It shall have the right to assist members of the tribe in presenting their claims and grievances before any court or agency of government. It shall have the right to employ attorneys of record or representatives for such services, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior.

(c) To approve or veto any sale, disposition, lease or encumbrance of tribal lands, interests in land or other tribal assets which may be authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs or any other official or agency of government, provided that no tribal lands shall ever be sold, except those tribal lands located outside of the Cheyenne River Reservation boundary, and outside of the Consolidation Area boundary lines established as of the date of the approval of Public Law 88-418 (August 11, 1964), and set out in tribal council action by resolution no. 92-64 (September 2, 1964). Tribal lands may not be encumbered or leased for a period exceeding five years, except as provided for in Article VIII, Section 3.

(d) To confer with the Secretary of the Interior upon all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of Budget and Congress.

(e) To receive voluntary relinquishments of allotments and heirship lands and to make assignments of tribal land to members of the Cheyenne River Sioux Reservation in conformity with article VIII of this constitution.

(f) To select subordinate boards, officials, and employees not otherwise provided for in this constitution and to prescribe their tenure and duties and to establish councils; to authorize and establish any association or organization having for its purpose and sole object the benefit of the members of the Cheyenne River Sioux Tribe. Such association or organization shall have the right to engage in collective or cooperative bargaining or marketing, or purchasing of supplies, crops, equipment, seed machinery, building or livestock, the council reserving the right to establish ordinances covering the activities of such association or organization, and to enforce the observance of such ordinances.

(g) To administer any funds or property within the control of the tribe; to make expenditures from available funds for public purposes, including salaries or other remuneration of tribal officials or employees. Such salaries or remuneration shall be paid only for services actually authorized in a regular and level manner and actually rendered. All expenditures from the tribal council fund shall be by resolution duly passed by the council to that effect and the amount so paid shall be a matter of public record at all times.

(h) The council shall have the power when just cause or extreme emergency exists, which shall create a hazard to the peace and safety of the tribe as a whole or to the individual members thereof, to require the individual members of the tribe or other residents upon the reservation to assist with community labor.

(i) To create and maintain a tribal council fund by accepting grants or donations from any person, State, or the United States, or by levying assessments of not less than ten cents, and not to exceed one dollar (\$1.00) per year, per capita on the qualified voters of the Cheyenne River Sioux Tribe, and to require the performance of community labor in lieu thereof, provided the payment of such per capita levy shall be made before any person shall vote in any election held more than six months after the date of said levy; and to levy taxes and license fees subject to review by the Secretary of the Interior, upon non-members doing business with the reservation. Any money so collected shall be disposed of as provided for in article IV, section 1 (x) of this constitution.

(j) To provide by ordinance, subject to review by the Secretary of the Interior, for removal or exclusion from the territory of the Cheyenne River Sioux Tribe of any non-members whose presence may be injurious to the members of the tribe, morally or criminally.

(k) To promulgate ordinances for the purpose of safeguarding the peace and safety of residents of the Cheyenne River Reservation, and to establish courts for the adjudication of claims or disputes arising among the members of the tribe and for the trial and punishment of members of the tribe charged with the commission of offenses set forth in such ordinances.

(l) To purchase under condemnation proceedings, land or other property needed for public purposes, subject to the approval of the Secretary of the Interior.

(m) To protect the public health and morals and to promote the public welfare by regulating the use and disposition of property of members of the tribe.

(n) To regulate the inheritance of property, real and personal, other than allotted lands, within the territory of the Cheyenne River Sioux Reservation, subject to review by the Secretary of the Interior.

(o) To provide by ordinance for the appointment of guardians for minors and mental incompetents, subject to the approval of the Secretary of the Interior.

(p) To adopt resolutions regulating the procedure of the council itself and of other tribal agencies and tribal officials of the reservation.

SECTION 2. Manner of review. Any resolution or ordinance which, by the terms of this constitution, is subject to review by the Secretary of the Interior, shall be presented to the superintendent of the reservation who shall, within ten (10) days thereafter, approve or disapprove the same. If the superintendent shall approve any ordinance or resolution, it shall thereupon become effective, but the superintendent shall transmit a copy of the same, bearing his endorsement, to the Secretary of the Interior, who may within ninety (90) days from the date of enactment, rescind the said ordinance or resolution for any cause, by notifying the tribal council of such rescission.

If the superintendent shall refuse to approve any resolution or ordinance submitted to him within ten (10) days after its enactment, he shall advise the tribal council of his reasons therefore. If these reasons appear to the tribal council insufficient, it may, by a majority popular vote, refer the ordinance or resolution to the Secretary of the Interior, who may, within ninety (90) days from the date of its enactment, approve the same in writing, whereupon the said ordinance or resolution shall become effective.

SECTION 3. Future powers. The council shall have the power to act on such other necessary or emergency cases as may be delegated to the tribe by the Secretary of the Interior, or by any other official or agency of the Government.

SECTION 4. Reserved powers. The foregoing enumeration of powers shall not be construed to limit the powers of the tribal council, but all powers of local government not expressly entrusted to the council by this constitution and by-laws shall be reserved to the legal voters of the Cheyenne River Tribe. Such powers may be exercised through appropriate by-laws and constitutional amendments.

#### Article V—Elections and Nominations

SECTION 1. All enrolled members of the Cheyenne River Tribe, 21 years of age or over, who have maintained legal residence on the reservation for a period of one year immediately prior to any election shall have the right to vote.

SECTION 2. No person shall be a candidate for membership in the tribal or district council or other tribal office unless he shall be a member of the Cheyenne River Sioux Tribe, and shall have resided for a period of one (1) year next preceding the election in the district of his candidacy and he shall be over twenty-five (25) years of age.

SECTION 3. Any member of the tribe may become a candidate for any office upon the signed petition of at least ten (10) legal voters from the district presenting his candidacy.

ORDINANCE NO. 24

Pursuant to the authority vested in the Cheyenne River Sioux Tribe, by its Constitution, and particularly by Article IV, Sections I (h) thereof, and its authority to provide for the welfare and needs of the Tribe, the Tribal Council of the Cheyenne River Sioux Tribe hereby charters a public corporation as the Cheyenne River Telephone Company, (hereinafter referred to as the Company), and enacts this ordinance which shall constitute the charter of the Company.

In any suit, action or proceedings involving the validity or enforcement of or relating to any of its contracts, the Company shall be conclusively deemed to have become established and authorized to transact business and exercise its powers upon proof of the adoption of this ordinance. A copy of the ordinance duly certified by the Secretary of the Council shall be admissible in evidence in any suit, action or proceedings.

I. Declaration of Need and Purposes

It is hereby declared:

That there exists on the Cheyenne River Reservation the immediate need to upgrade, install, and provide a modern telephone communications system to rural and village or city dwellers who are geographically in an isolated area, with long distances to central market stations or communities, medical centers and service centers; also the need to improve the economic opportunities, and provide the every day necessities in family and business needs.

The rural areas as well as the entire area is subject to natural hazards of sleet, snow storms, and limited traffic areas, and all of which intensifies the need for a dependable telephone communications systems such as is in the surrounding areas of this community to provide the comforts and security and safety generally afforded to citizens in like communities.

That a corporate structure of this nature lends itself to better implement routine matters to conduct the affairs of the company and provide the telephone service contemplated and all incidentals thereto. To provide for employment, training, and development of people needed to properly carry out the corporate needs. To construct, own, maintain and operate telephone and telegraph lines within the State of South Dakota; to acquire, by purchase or otherwise, and to own and maintain and operate telephone and telegraph lines and telephone exchanges within the State of South Dakota; to lease and maintain and operate telephone lines within said state; to acquire, by purchase or otherwise, and to sell the stock of other telephone and telegraph corporations or associations; to engage in the business of supplying telephone services to the public over lines owned or leased by this Company; to engage in the business of building and constructing telephone and telegraph lines for other persons or corporations to engage in the business of manufacturing and selling telephone and telegraph instruments and telephone and telegraph supplies; to transmit messages from point to point for compensation and to do and perform any or all acts and things requisite or necessary in the erection, construction, maintenance and operation of complete system of telephone and telegraph; to prosecute such other business as said Company may deem necessary or expedient in connection with said telephone or telegraph business; and to buy, sell, own, hold, acquire, mortgage, incumber and convey, real and personal property of every kind and description or nature whatsoever, within the State of South Dakota.

The places from which and to which such lines or telephones or telegraph are to be constructed or maintained and operated, are



telephone exchanges within the boundries of the Cheyenne River Sioux Agency, and immediately adjacent thereto, inclusive of the City of Isabel, Dupree and Eagle Butte, in South Dakota, with lines connecting such exchanges or terminal points and also a toll line within these boundries, and with the toll lines of other telephone companies and telegraph companies and also to other points and places in South Dakota, which the development and growth of such lines or systems may require same to be extended.

The company shall be owned in its entirety by the Cheyenne River Sioux Tribe whose offices are at Eagle Butte, South Dakota, and may not be sold unless at the request of said Cheyenne River Sioux Tribe.

## II. Definitions

The following terms, wherever used or referred to in this ordinance shall have the following respective meanings, unless a different meaning clearly appears from the context:

- a. "Board" means the Board of Directors of the Company.
- b. "Council" means the Cheyenne River Sioux Tribal Council.
- c. "Federal Government" includes the United States of America, the Rural Electric Administration, or any other agency or instrumentality, corporate or otherwise of the United States of America.
- d. "Bonds" means any bonds, notes, interim certificates, debentures, or other obligations issued by the Company pursuant to this ordinance.
- e. "Obligee" includes any bondholder, agent or trustee for any bondholder, or lessor demising to the Company property used in connection, with a project, or any assignee or assignees of such lessor's interest or any part thereof, and the Federal government which it is a partly to any contract with the Company in respect to a telephone project.